

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



76-7155

To be argued by  
GEORGE C. MANTZOROS

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

B  
P/S

76-7155

DONALD SCHANBARGER,

Plaintiff-Appellant,

-against-

SUPERINTENDENT OF THE NEW YORK STATE POLICE, DISTRICT  
ATTORNEY OF ALBANY COUNTY, DIRECTOR OF ALBANY COUNTY  
PROBATION DEPARTMENT, SHERIFF OF ALBANY COUNTY AND  
ALBANY COUNTY JUDGE JOHN J. CLYNE,

Defendants-Appellees.

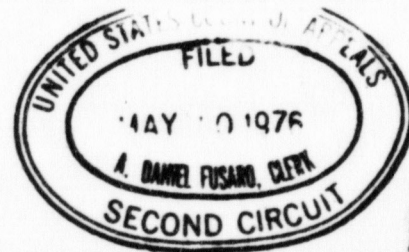
ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF NEW YORK

BRIEF FOR APPELLEE SUPERINTENDENT  
OF THE NEW YORK STATE POLICE

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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76-7155

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DONALD SCHANBARGER,

Plaintiff-Appellant,

-against-

SUPERINTENDENT OF THE NEW YORK STATE POLICE, DISTRICT  
ATTORNEY OF ALBANY COUNTY, DIRECTOR OF ALBANY COUNTY  
PROBATION DEPARTMENT, SHERIFF OF ALBANY COUNTY AND  
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ON APPEAL FROM THE UNITED STATES  
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BRIEF FOR APPELLEE SUPERINTENDENT  
OF THE NEW YORK STATE POLICE

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Preliminary Statement

The plaintiff-appellant appeals from an order and  
judgment (Foley, J.) dismissing his complaint for "failure  
to state claims against any of the above-named defendants

upon which relief can be granted" (App. 33). Appellant commenced this action against the Superintendent of the New York State Police,\* and others, on July 15, 1975 (App. Index) demanding a prohibitory and mandatory injunction calling for federal judicial intervention and supervision into State police policies and procedures, and, for the adoption of specific rules (App. 12-16: 17-12th causes of action; Br. p. 1) which would, in effect, alter, change and amend certain New York legislation which has not been constitutionally challenged. The Attorney General appeared on behalf of the Superintendent of the New York State Police and moved to dismiss this action under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

#### Issues Presented

1. Whether the complaint states a claim under 42 U.S.C. 1983 ("subjects or causes to be subjected") against the defendant Superintendent of the New York State Police who was not allegedly present at the scene at the parking lot about midnight April 9, 1974, and who did not directly cause or order others to commit any acts constituting a deprivation of plaintiff's constitutional rights?

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\* William G. Connelie has appointed Superintendent in July 1975 succeeding William E. Kirwan.

2. Whether any compelling or extraordinary circumstances are here alleged for federal judicial intervention and supervision of the New York State police by injunction?

Statement of the Case

Plaintiff alleges in his complaint and as he further explains in his brief, that "[a]round midnight of May 9, 1974" he was in a parking area in the Town of Colonie, Albany County (App. 22) repairing his Volkswagen Camper (App. 1). Two State policemen approached him and "demand[ed]" his camper's "registration" which plaintiff admittedly "failed to display" (App. 1). A "search" of the camper was then made by "two other people dressed as troopers" who, he says, "on information and belief removed items from said camper\* \* \*" (App. 1) which apparently included the "firearm" - the basis for one of the charges under Penal Law 265.05 subd. 2 (App. 2). He alleges that he was then taken to the "N.Y.S. Police Barracks" where he was detained for "around two hours" and that he was (App. 2):

"\* \* \*then taken to a magistrate and charged with violation of the N.Y.S. Vehicle & Traffic Law Sec. 1102 (failure to obey an order) Penal Law Sec. 110 (attempt to commit a crime) and Sec. 265.05 subd. 2 (possession of a firearm) which caused plaintiff's incarceration at the Albany County Sheriff's jail for over a week".

Appellant alleges that "Judge Clyne reversed the conviction and dismissed the charges against plaintiff (App. 4)" (Br. p. 6).

The Volkswagen Camper was placed in a garage when plaintiff failed to show the registration (Vehicle and Traffic Law § 1204[c]) (App. 4-5) and plaintiff has commenced a replevin action (App. 5) in the Supreme Court, Albany County, against Edward Dott's Garage (App. 23). He has also commenced other multiple actions in the New York State Courts: an action in the New York Court of Claims (App. 22-23); and an action for damages against four State policemen in the Supreme Court, Washington County (App. 24).

Nevertheless, appellant demands an injunction prohibiting and ordering the New York State Police, as follows (App. 12-16) (see appellant's summary in his brief, p. 1):

"(7) \* \* \*from arresting a person who is not to be taken immediately to a magistrate for arraignment;

"(8) \* \* \*from charging one who was asked to establish innocence or asked questions;

"(9) \* \* \*from making any charge when injury can not be shown;

"(10)\* \* \*from super[vising], arrest[ing], charg[ing], or search[ing] as a State agent after being spared criminal conviction and civil damages because of prohibited State conduct;

"(11)\* \* \*from [making] a search of anything without advance [arrangement] for its safety without attachment of a lien;

"(12)\* \* \*from using a charge by Uniform Traffic Ticket when there is an arrest or search connected with it".

Plaintiff also demands an order as to all defendants (App. 7) for an injunction against "(1) All collection or of distribution of information about a person whos[e] criminal conviction by state agent that fails must be given to such deemed guiltless person" (Appellant's Br. p. 1) (App. 7 complaint pars. 26-27).

#### The Opinion Below

The District Court (Foley, J.) correctly dismissed this action denying appellant's demands for federal judicial intervention and supervision of state police policies and procedures, stating (App. 31-32):

"A reading of the twelve causes of action leaves no doubt in my mind that the plaintiff has not alleged viable claims to indicate in any degree that he was deprived of or had his constitutional rights violated.

Adickes v. Kress & Co., 398 U.S. 144 (1970). Chief Judge Kaufman recently in Fine v. The City of New York, et al., F. 2d \_\_\_\_\_, 12/31/75, Dkt. No. 75-7021, [discussed] several of the principles to be applied here. Complaints of this kind are plainly insufficient unless they contain some allegations of facts indicating a deprivation of civil rights.\* \* \* Several defendants at least were not personally involved. Johnson v. Glick, 481 F. 2d 1028 (2d Cir. 1973).

"The United States Supreme Court handed down very recently a ruling that has important application here. Rizzo v. Goode, \_\_\_\_\_ U.S., decided 1/21/76, 44 U.S. Law Week 4095. There, it was noted that, as here, the police officers were not named as defendants and therefore there was serious doubt whether there was an Article III case or controversy between the parties for the federal courts. It was also stated that where the authority of a state official is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between the federal equitable power and state administration of its own laws'. It was also emphasized that principles of federalism have applicability where injunction is sought not only against the judicial branch of state government, but also against those in charge of an executive branch of state or local government. See Kugler v. Helfant, 421 U.S. 117 (1975); Huffman v. Pursue Ltd., 420 U.S. \_\_\_\_\_ (1975).

POINT I

THE COMPLAINT DOES NOT ALLEGE  
THAT THE PREDECESSOR SUPER-  
INTENDENT WAS PRESENT AT THE  
SCENE AT THE PARKING LOT WHEN  
PLAINTIFF WAS ARRESTED OR THAT  
HE DIRECTLY CAUSED OR ORDERED  
THE POLICEMEN TO COMMIT ANY ACT  
DEPRIVING PLAINTIFF OF HIS CON-  
STITUTIONAL RIGHTS WHICH ARE NOT  
IDENTIFIED

The Civil Rights Act (42 U.S.C. § 1983) provides for a "proper proceeding for redress" whenever a "person\* \* \* under color of any statute\* \* \* of any State\* \* \* subjects, or causes to be subjected, any citizen of the United States\* \* \* to the deprivation of any rights\* \* \* secured by the Constitution\* \* \*". There is no allegation that the defendant predecessor Superintendent was present at the scene of the incident at the parking lot "around midnight of April 9, 1974" (App. 1) where plaintiff was arrested by policemen when "he failed to display a registration for a V.W. Camper" (App. 1) and then charged for possession of a "firearm" and under the Vehicle and Traffic Law (App. 2). Nor is there any "affirmative link" (Rizzo v. Goode, 421 U.S. 902, 46 L. ed. 2d 561 at 569 [1976]) between the acts of the policemen and the Superintendent that he directly caused

or ordered the policemen to commit any act constituting a deprivation of plaintiff's constitutional rights. The District Court correctly found that "[s]everal defendants at least were not personally involved" (App. 32) - obviously referring to and including the defendant Superintendent. Johnson v. Glick, 481 F. 2d 1028, 1034 (2d Cir. 1973), cert. den. 414 U.S. 850; Davidson v. Dixon, 386 F. Supp. 482, 489, 490 (D. Del. 1974). Section 1983 provides for redress in a "proper proceeding" -- which does not include mandatory injunctive relief into local police conduct except in extraordinary circumstances -- for torts of a constitutional magnitude and the complaint must allege "in detail facts showing some intentional purpose or deprivation of constitutional rights" (Moore v. Kibbee, 385 F. Supp. 765, 767 [E.D.N.Y. 1974]). In the absence of such required allegations against the defendant predecessor Superintendent, the District Court correctly dismissed the complaint at bar (App. 31, 33). Adickes v. Kress & Co., 398 U.S. 144 (1970); Fine v. The City of New York, 529 F. 2d 70, 73, 76 (2d Cir. 1975); Powell v. Workmen's Compensation Board, 327 F. 2d 131, 137 (2d Cir. 1964).

Besides, there can be no constitutional objection to police inspection of a vehicle deemed abandoned when plaintiff failed to display its registration. There was

no "search". The Fourth Amendment states: "The right of the people to be secure in their\* \* \*effects, against unreasonable searches\* \* \*". People v. Anderson, 24 N Y 2d 12 (1969); People v. Brown, 40 A D 2d 527 (2d Dept. 1972); People v. D'Ambrosio, 28 A D 2d 1130 (2d Dept. 1967). Moreover, there is no constitutional challenge to the New York State statutes (Criminal Procedure Law §§ 140.50, 140.20, Vehicle and Traffic Law § 1204(c)) under which the unnamed policemen presumably acted at the parking lot about midnight on April 9, 1974 (App. 1). Admittedly, about midnight on April 9, 1974, plaintiff "fail[ed] to supply a registration for a V.W. camper he was repairing in a parking area on demand of State Troopers" which was followed by a "search of the camper\* \* \*" (Br. p. 5; App. 1) which apparently disclosed his possession of a "firearm" (App. 2) resulting in his consequent arrest. Penal Law § 140.50 ("Temporary questioning of persons in public places; search for weapons") authorizing a police request for plaintiff's identification and "an explanation of his conduct" including requesting a motorist for the registration of his vehicle (People v. Isaac, 38 Misc 2d 1018 [Sup. Ct. N.Y. Co. 1963]) has been sustained as constitutional. Sibron v. New York, 392 U.S. 40 (1968); United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973), see also, People v. Green, 35 N Y 2d 193 (1974).

Nor can plaintiff contend that by some State statute or procedure, he was deprived of constitutional rights either (1) by his arraignment by a magistrate "around two hours" later (App. 2) which is not alleged or shown to have been an "unnecessary delay" after "performing\* \* \*all recording, fingerprinting and all other preliminary police duties\* \* \*" (Criminal Procedure Law, § 140.20); or (2) for the storage of his Volkswagen in a private garage for safekeeping (Vehicle and Traffic Law § 1204[c]) (App. 4, 27) which, in any event, could not be considered a taking of personal property without due process of law. Plaintiff admittedly refused to show the registration (App. 1) which authorized its storage in the private garage. (Vehicle and Traffic Law 1204(c)). Plaintiff has an adequate remedy at law as evidenced by his replevin action in the Supreme Court, Albany County (App. 23). See Bonner v. Coughlin, 517 F. 2d 1311 (7th Cir. 1975).

Whether or not the State policemen were authorized by Criminal Procedure Law § 140.50 or by the Vehicle and Traffic Law § 401(4) (United States v. Bhono, 256 F. Supp. 391, 393 [S.D.N.Y. 1966]) to ask plaintiff for his Volkswagen Camper's registration which has been permitted (see People v. Isaac, supra), does not end the matter. No search of plaintiff's

person was here made as in People v. Marsh, 20 N Y 2d 98 (1967) (a search 2 years after the warrant) upon which he relies (Br. p. 7). Here, the State police searched the Volkswagen whose ownership he refused to claim or prove by his admitted refusal to show its registration (App. 1). Besides, searches have been sustained in traffic-related arrests. United States v. Robinson, supra, 414 U.S. 218; Gustafson v. Florida, supra, 414 U.S. 260; United States v. Bhono, 256 F. Supp. 391, 393 (S.D.N.Y. 1966) (Weinfeld, J.).

There is a common-law basis for police inquiry for an auto registration on grounds less compelling than those which would justify a "stop" under Criminal Procedure Law § 140.50 (see People v. Rosemond, 26 N Y 2d 101 [1970]). The Court in Rosemond, supra, held that (26 N Y 2d at 104):

"The police can and should find out about unusual situations they see, as well as suspicious ones. It is unwise, and perhaps futile to codify them or to prescribe them precisely in advance as a rule of law. To a very large extent what is unusual enough to call for inquiry must rest in the professional experience of the police".

Even assuming that the circumstances at midnight on April 9, 1974, which prompted the State policemen to ask plaintiff for the registration of his Volkswagen Camper were less

compelling than in Rosemond, supra, they should be deemed sufficient to justify the inquiry. See, People v. . Archiopoli, 39 A D 2d 748 (2d Dept. 1972). Plaintiff's claim of a "right to be left alone" (App. 5) is an abstract claim which does not square with the facts and exigencies of the circumstances which he himself created at the parking lot around midnight of April 9, 1974.

Thus, in the absence of any legally sufficient allegation that the defendant predecessor Superintendent acted contrary to any New York State statute or pursuant to any unconstitutional statute, the plaintiff's action - in effect a suit by an individual against the State of New York - to enjoin the Superintendent from acting pursuant New York statutes, is barred by the Eleventh Amendment to the U.S. Constitution.

## POINT II

NO EXTRAORDINARY CIRCUMSTANCES ARE  
ALLEGED WARRANTING FEDERAL JUDICIAL  
INTERVENTION AND STATE POLICE SUPER-  
VISION BY INJUNCTION CONTRARY TO CON-  
CEPTS OF FEDERALISM

Plaintiff's six extraordinary demands for federal judicial intervention and police supervision by mandatory injunctive relief (Complaint 7th-12th causes of action

App. 12-16) upon an isolated incident at midnight on April 9, 1974, when plaintiff "failed to display a registration" of his Volkswagen camper "on demand of the Troopers" (App. Br. p. 5) resulting in his arrest by unnamed state policemen (App. 1), is far-reaching and contrary to constitutional federal-state relations (Rizzo v. Goode, 421 U.S. 902 [1976]). The complaint fails to demonstrate that this action for an injunction is a "proper proceeding for redress" (42 U.S.C. § 1983). No constitutional right allegedly infringed by the defendant predecessor Superintendent is identified in the complaint at bar which would support a decree prescribing and adopting plaintiff's version of specific police procedures which, in some instances, would alter and amend state legislative regulations and standards which are not here challenged as unconstitutional (e.g. proposed immediate arraignment [Complaint] par. 46 App. 13) substituting legislative requirement of "unnecessary delay" [Criminal Procedure Law § 140.20]; prohibiting temporary questioning of persons and searches for weapons [Criminal Procedure Law § 140.50]; and storage of unregistered vehicles [Vehicle and Traffic Law § 1204(c)]. Thus, plaintiff's demand for a judgment establishing new standards in a judgment which must conform and be supported by pleadings, proof and findings

(Allen v. Pullman's Palace Car Co., 139 U.S. 658 [1891]), cannot be predicated upon some "far fetched hypotheses" (O'Reilly v. Wyman, 305 F. Supp. 228, 231 [S.D.N.Y. 1969]) or designed to extend "at large" which it cannot do (Alemite Mfg. Co. v. Staff, 42 F. 2d 832 [2d Cir. 1930] [L. Hand, J.]).

Besides, an injunction is an extraordinary remedy (James v. Ogilvie, 310 F. Supp. 661, 665 [N.D. Ill. 1970]) requiring allegations that "plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of \* \* \* official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)". O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Allee v. Medrano, 416 U.S. 802, 815 (1974) (require "persistent pattern of police misconduct"). Apart from the apparent disposition of his state prosecution by Judge Clyne's reversal of plaintiff's conviction and dismissal of the charges (Appellant's Brief 5-6), there is no allegation of any real and threatened injury or absence of an adequate remedy at law warranting extraordinary injunctive relief. The state prosecution afforded to the plaintiff an appropriate forum for judicial identification and evaluation of any alleged unconstitutional police misconduct and the application of sanctions by the exclusionary rule as to admissibility of evidence and with a full and complete right of appeal by certiorari to the United States Supreme Court for

vindication of his federal constitutional rights. Perez v. Ledesma, 401 U.S. 82, 84-85 (1971); Kugler v. Helfant, 421 U.S. 117 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Indeed, plaintiff has invoked his available State court remedies in multiple actions; to wit: in the New York State Court of Claims (App. 22-23), the Supreme Courts of Washington County (App. 4, 5, 19, 20, 22-24) and Albany County (App. 23). His admitted prior "tro[u]ble with police" in "1968" (App. 6, Br. p. 7) is not a relevant or legally sufficient circumstance for a reasonable inference of any irreparable injury. Nor does such circumstance demonstrate any actual or present case or justiciable controversy warranting the extraordinary injunctive relief and federal judicial intervention and police supervision plaintiff here seeks. Safeguard Mutual Insurance Co. v. Commonwealth of Pennsylvania, 372 F. Supp. 939, 949 (E.D. Pa. 1974).

No extraordinary circumstances are here shown for federal judicial intervention and police supervision by injunction which plaintiff here demands. In Allee v. Medrano, supra, the Supreme Court held that even "[i]solated incidents of police misconduct under valid statutes would not, of course, be cause for the exercise of a federal court's equitable powers"

(416 U.S. at 815). Federal intervention and supervision over local police procedures by injunction must be predicated upon legally sufficient allegations of widespread violations of constitutional rights over a period of time as a result of departmental policies and procedures and subject to repetition. Rizzo v. Goode, supra; Allee v. Medrano, supra, 416 U.S. at 815; Washington Free Community, Inc. v. Wilson, Chief of Police, 484 F. 2d 1078 (D.C. Cir. 1973); Long v. District of Columbia, 469 F. 2d 927 (D.C. Cir. 1972); Lawford v. Gelston, as Commissioner of Police, 364 F. 2d 197 (4th Cir. 1966); Washington Mobilization Committee v. Cullinane, Chief of Metropolitan Police, 400 F. Supp. 186, 191 (D.C.D.C. 1975); Belknap v. Leary, Police Commissioner, 427 F. 2d 496 (2d Cir. 1970). No proof of any plan or "deliberate policy" of constitutional violations compelling injunctive relief is here alleged. Hague v. C.I.O., 307 U.S. 496 (1939).

The Supreme Court in Rizzo v. Goode, supra, 421 U.S. 902, 46 L. ed. 2d 561 at 573, reemphasized the judicial policy predicated upon "important considerations of federalism" that "[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and state

administration of its own law'". Thus, upon the absence of any allegation that the defendant predecessor Superintendent caused or subjected plaintiff to any deprivation of any constitutional rights which are not identified, and within the applicable prescribed "principles of federalism" (App. 32-33) of the U.S. Supreme Court, the District Court's dismissal of the action for "failure to state claims" against the defendant Superintendent (App. 33) should be affirmed in this appeal.

#### CONCLUSION

THE ORDER AND JUDGMENT OF  
THE DISTRICT COURT DIS-  
MISSING THE ACTION AS TO  
THE DEFENDANT SUPERINTENDENT,  
SHOULD BE AFFIRMED IN ALL  
RESPECTS WITH COSTS.

Dated: New York, New York  
May 19, 1976

Respectfully submitted,

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of Counsel

STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

MARY KO , being duly sworn, deposes and  
says that she is employed in the office of the Attorney  
Appellee Supt. of the New York State Police  
General of the State of New York, attorney for /  
herein. On the 18th day of May , 197<sup>6</sup> , she  
served the annexed upon the following named person :

MR. DONALD SCHANBARGER  
Ferguson Lane  
Salem, New York 12865

Plaintiff  
~~Attorney~~ in the within entitled action by depositing  
a true and correct copy thereof, properly enclosed in a post-  
paid wrapper, in a post-office box regularly maintained by  
the Government of the United States at Two World Trade Center,  
New York, New York 10047, directed to said ~~Attorney~~ Plaintiff at the  
address within the State designated by him for that purpose.

Mary Ko

Sworn to before me this  
18th day of May , 1976  
19

George J. Matthews  
Assistant Attorney General  
of the State of New York